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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 5216 MISC.

HERBERT E. GIBSON,
PETITIONER

v.

THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Jurisdiction

The judgment of the Supreme Judicial Court was entered on February 11, 1970. The Petition for a Writ of Certiorari was filed on May 12, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Question Presented

Whether the Supreme Judicial Court erred in this case in deciding that in light of the circumstances of these identifications there was no error in refusing to hold that all photographs shown to the witnesses in this case in the investigatory stage had to be segregated and turned over to defense counsel?

Statement

After a jury trial, the defendant Herbert Gibson was convicted of the armed robbery of the Joseph Warren Co-Operative Bank (App. A).

At the pre-trial hearing, defendant's counsel requested an opportunity to examine all photographs shown to the victims of the robberies in the latter part of Request No. 6 in his Motion for Discovery (R. 8).[1] Counsel for the defendant was invited to police headquarters to examine these photos at any time he desired (Pre-trial Tr. 18-30). There was only one photo of the defendant among the photographs shown to the witnesses (Pre-trial Tr. 16-18).

The Joseph Warren Co-Operative Bank was robbed on April 16, 1968, June 26, 1968, and July 22, 1968 (Pre-trial

[1] "R" refers to the document entitled Summary of Record and Assignments of Errors. Pre-Trial Transcript is Pre-Trial Tr. ——. See Tr. Cover Transcript Vol. 1 is pinkish color, and is referred to as Tr. ——.

Tr. 6). About 12:30 p.m. on July 22, 1968, Albert Pelletier, the treasurer of the bank, was working as a teller there (Tr. 16-17). After the robbery, Mr. Pelletier called the police and, when they arrived, gave them a description of the holdup man (Tr. 88). He then went to Boston Police Headquarters with the police to look at photos and for at least a half-hour he looked through a file of photos (Tr. 90-91). He looked through several hundred of them and picked out one (Tr. 90-91) in the following circumstances: while examining the photos, Mr. Pelletier saw the defendant's photo, hesitated, but said nothing and went on to other photos looking at an additional 50 or 100 photos. Then he went back to the defendant's photo and picked it out (Tr. 114).

Richard Sage, an employee, was working in the bank at the time of the holdup. He was seated at a desk about seven feet away from the holdup, with nothing to obstruct his view, and he saw the holdup man for about two and a half to three minutes (Tr. 119). He also furnished the police with a description (Tr. 122). Sometime later he viewed 25 or more photos, all similar in nature with front and side views. He also identified the defendant's photo (Tr. 123-124).

Officer Albert W. Balutis described the procedure at police headquarters when Mr. Pelletier examined photos, estimating that there are several thousand pictures there and that Mr. Pelletier hesitated at defendant's photo at first and then went back to the same picture and picked it out (Tr. 131).

Officer Balutis later brought between 50 to 100 pictures to the bank for Mr. Sage to look at and Mr. Sage picked out the defendant's photo (Tr. 133-134). These photos were described as all regular police-type photographs, front and side, with nothing to set defendant's picture apart from the others (Tr. 24).

Argument

I. The Defendant Was Afforded The Opportunity To View The Police Photographs Although No Exact List Was Made At The Investigatory Stage.

The defendant's counsel was afforded the opportunity to view the police photographs.

> "Mr. Buckley: Your Honor, the police officer says that Mr. Skeels is invited to police headquarters to look at all the photos. (Pre-Trial Tr. 19)."
>
> "The Court: Well, the police are willing to have you go down and look at them. I am not denying them to you, but I am not going to say that the police are going to be put in the position later of having it contended that they didn't show you every single one and jot and title of every picture that was there in police headquarters. I am sure they didn't show the ones of the fellows that were taken back in 1903 with their mustaches and handlebars and everything else. There is a limit.
>
> But you will let them see the photographs that are down there, will you?
>
> Officer Balutis: Any time he wishes, your Honor.
>
> The Court: Okay, then you are given number 6, but if that isn't sufficient, you can have your exception.
>
> Mr. Skeels: Thank you, your Honor."
>
> Exception No. 4.
> (Pre-Trial Tr. 20)

The fact is that the defendant had the opportunity to examine the photograph books although no record was made at the time, there being no suspects for the crime. *The fact that the defendant failed to avail himself of the*

opportunity afforded him hardly rises to constitutional error.

Unlike Simmons, there was no suspect so there was no pre-selected group of pictures which could have been selected and kept available in this one case without seriously jeopardizing the Boston Police Department's photographic records.

Indeed, there is no reason why a Simmons was not put on the police to produce these pictures at the trial. No reason is given as to why the defendant found the examination of the pictures at the police station totally unsatisfactory to him.

II. No Harm Resulted From The Failure Of The Police To Keep And Produce A Record Of What Other Photographs The Witnesses Pelletier And Sage Looked Through In An Effort To Identify The Robber.

The defendant argues that if an accused is not represented by counsel at a photo-identification, a record of the photographs there should be preserved and be subject to discovery by defense counsel. He argues that the absence of the photographs "prevented counsel . . . from effectively testing these critical identifications" and the photographs are "a minimum necessity for a meaningful cross-examination."

At the outset it should be noted that *United States* v. *Wade*, 388 U.S. 218, does not apply to the photograph identifications that occurred in this case. *Wade*, recognizing that a lineup may be a "critical stage" of the proceeding against an accused, merely applies to it the principles of *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436, securing to an accused the assistance of counsel when "the investigation is no longer

a general inquiry into an unsolved crime but has begun to focus on a particular suspect [and], the suspect has been taken into police custody" (378 U.S. at 490-491) or is subjected to "in-custody interrogation" (384 U.S. at 441).

In a post-indictment or lineup situation, suspicion has focused on a particular individual. His mere presence in the lineup attests that fact. Photograph identifications, on the other hand, serve a distinctly different purpose. See *Commonwealth* v. *Bumpus*, 354 Mass. 494, 501 (Mass. Adv. Sh. (1969) 967); also *United States* v. *Hutto*, 393 F. 2d 783, 785 (4th cir. 1968). Suspicion has not focused on a particular individual. Indeed the very purpose of the process is to see if suspicion may properly focus upon an individual. The danger *Wade* seeks to guard against, the "potential for improper influence" (388 U.S. at 233) because of "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification" (id. at 228) is non-existent. Police do not know who the criminal is and seek thereby to find out.

"Identification," as this court has pointed out, has two distinct meanings: "'to inform others [here, the police] who needed to know that the man was, in the witness' view, the [culprit]'" and "'recognition by the witness'" of him as the culprit. *Commonwealth* v. *Sullivan*, 354 Mass. 598, 605 (Mass. Adv. Sh. (1969) 967). It is the difference between recognition for purposes of aiding in the apprehension of a criminal and identification of one in custody for evidentiary purposes.[2]

In this case, suspicion had not focused on the defendant until after the photo-identifications. Mr. Pelletier was

---

[2] The Supreme Court itself, in *Wade*, recognized the difference in the lineup and photograph identification procedures when it listed as one test of whether an in-court identification was independent of a tainted lineup identification, "the identification by picture of the defendant prior to the lineup" 388 U.S. 241.

taken in a squad car to police headquarters about half an hour after the robbery (Tr. 90) to look through the files of photographs there (Tr. 20). Mr. Sage remained at the bank (Tr. 91). After Pelletier had picked out the defendant's photograph from many (Tr. 20), perhaps as many as several hundred (Tr. 91), Officer Balutis took at least 50 photos (Tr. 144; see also Tr. 133), among which was mingled the one Pelletier had picked out (Tr. 61-62), back to the bank for Sage to see. Sage at that time was unaware that Pelletier already had gone to the station house (Tr. 45) and did not know of Pelletier's selection of the particular photograph. Sage viewed 25 of the photos and picked out the same one as had Pelletier (Tr. 39-40). Only then did Officer Balutis make application for an arrest warrant; and the defendant was later arrested (Tr. 134).

Clearly, defendant was not a suspect (and no right to counsel attached) when Pelletier perused the police file of photographs. See *United States* v. *Butler*, —— F.2d —— (1st Cir. June 3, 1970).

Nor is Sage's identification to be distinguished from Pelletier's. The repetition of the process, immediately thereafter with Sage (albeit with somewhat fewer but still a substantial number of photos) had the same purpose and was part of the same process started with Pelletier—to narrow the focus of the investigation to a particular suspect. In effect, the same test had been run twice to check its result.[3]

The defendant's main thrust is that the other photographs examined by Sage and Pelletier may have been useful to him to impeach the in-court identifications. In

[3] Although the defendant's picture was the same, there is no indication that the other 25-50 photographs shown to Sage were among those Pelletier had perused and no inference may be drawn that police kept a record of all the photographs examined by Pelletier.

this regard it should be noted, first, that the in-court identifications were independent of the photo-identifications. Among the factors *Wade* designates as relevant to that inquiry are:

> "... prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification ..." (388 U.S. at 241).

Here both eyewitnesses amply observed the defendant during the course of the robbery which took place during daylight in summer. Although he was wearing sunglasses (Tr. 34) and a hat (Tr. 88, 113), he was not wearing any mask or disguise. Mr. Pelletier observed the robber "three minutes or perhaps longer" (Tr. 18, also Tr. 88). He had an unobstructed view of him (Tr. 87) through a glass partition (Tr. 19) from a distance of about three feet (Tr. 20). Mr. Sage testified he observed the robber for two and a half to three minutes (Tr. 37, 119) with an unobstructed view (Tr. 36) at a distance of approximately seven feet (Tr. 36, 119). Both witnesses had seen the robber on a prior occasion when the bank was robbed by him in June (Tr. 29, 37, 43, 93-94, Pelletier; Tr. 121, Sage). Both, in short, had ample opportunity to fix the defendant in their minds and "to observe the alleged criminal act." It was from Pelletier that defendant obtained the money (Tr. 89).

After the robbery but prior to their viewing of the photographs, Pelletier and Sage each gave his description of the robber to police (Tr. 25, 122). Pelletier described the

robber as a short, light-complected Negro with a soft hat (Tr. 88, 113) and a raincoat or trenchcoat (Tr. 88, 113), plaid shirt, lean face, no special facial characteristics (Tr. 25), slight build, smaller than the witness (Tr. 88), weighing perhaps 130-135 pounds, "five-eight or five-nine" (Tr. 26, 88). Sage described him as five feet seven inches, about 140 pounds, light-skinned Negro man, wearing a hat and sunglasses, small built (Tr. 122), in his late 20's or early 30's (Tr. 45, 126). Pelletier also stated on voir dire that in his own mind he thought the robber to be in his late 20's (Tr. 28) and that he was wearing sunglasses (Tr. 34). Defendant was in fact 29 years old at the time of the robbery (Tr. 60) and the witnesses' descriptions of him were reasonably accurate (Tr. 52). In the language of *Wade*, there was no discrepancy between the pre-identification description and the defendant's actual description.

There were, however, differences between the descriptions given by the witnesses to the police and the photographs they picked out shortly after the robbery (Tr. 45, 122-123). The photograph of defendant had been taken ten years earlier; it showed him with a mustache (Tr. 27, 32, 93, 124), a straw (rather than a soft) hat (Tr. 32), and without sunglasses (Tr. 34). Pelletier hesitated when he first came to the picture and later came back to it (Tr. 24, 114). It was, of course, a flat, two-dimensional representation. In court, the witnesses were able to identify the person himself, readily and without hesitation (Tr. 18, 87-88, Pelletier; Tr. 120, Sage). They had no doubt (Tr. 27, 39, 95-96, Pelletier; Tr. 124, Sage). Clearly their in-court identifications were the result of their repeated, prolonged personal observation of the robber, rather than of their looking at an outdated photograph of him at police headquarters. The trial court correctly ruled (Tr. 50-53, 64) that the in-court identifications were not influenced by the photo-identifications.

In *Simmons* v. *United States*, 390 U.S. 377, 384, the Supreme Court held:

> "We are unwilling to prohibit . . . [the technique of initial identification by photograph], either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. . . . [A] pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

There was not, it should be noted secondly, the slightest hint here that there was any improper suggestion at the photograph identifications. See *Commonwealth* v. *Geraway*, Mass. Adv. Sh. (1969) 373, 377-379; *Commonwealth* v. *Nassar*, Mass. Adv. Sh. (1968) 681 (354 Mass. 249, 261-262); *Commonwealth* v. *Sullivan*, Mass. Adv. Sh. (1968) 1081 (354 Mass. 598, 605); *People* v. *Romero*, 272 A.C.A. 40, 49-50, 77 Cal. Rptr. 175 (1969).

The photographs at police headquarters were all in filing drawers, each drawer containing from 25 to 100 pictures (Tr. 131). Pelletier was uncertain how many he had seen —"over 100" (Tr. 21), several hundred (Tr. 91, 131). They were all similar in character (Tr. 24). Sage was shown "25 or more" photos (Tr. 123). Officer Balutis estimated he brought 50-100 photographs to the bank (Tr. 133), "at least 50" (Tr. 144)—all similar in that they were standard police photos, front and side views (Tr. 124, 133). The trial court carefully inquired into the matters:

> "The Court. As far as the pictures are concerned, will you describe the pictures you saw, how you saw them, where they were and what the general type of pictures was that you were shown at the police station?

"The Witness. [Pelletier] I went to the police headquarters and I was handed a book with pictures of many people, different types of people, and I went through the book several times, and then I was given another book with more pictures.

"The Court. In other words, in the first book you found no one?

"The Witness. I, I saw one picture that I couldn't —looked familiar to me, but I couldn't determine immediately, so that I looked through the second book and then I asked to see the first book again, and the second time I was sure of this picture.

"The Court. All right. Now, tell me about that one particular picture that you became sure of: Was there anything different about the way the photograph was shown up which would distinguish it from any of the other photographs in the book?

"In other words, was it a regular police type of photograph, front and side?

"The Witness. They—excuse me; they all were, your Honor.

"The Court. All of them?

"The Witness. Yes.

"The Court. So, in other words, that's what I meant, was, there wasn't a Bachrach picture of somebody up in the middle of it, surrounded by a bunch of snapshots?

"The Witness. No, your Honor.

"The Court. Or something like that?

"The Witness. No, your Honor." (Tr. 23-25).

Nor is there any likelihood of irreparable misidentification, or of a "cruel injustice . . . of mistaken identification." The identification witnesses here were reliable, reputable, well-educated persons -- one holding an execu-

tive position with a bank; the other a university student — persons not likely to be coerced by officers into making a false identification. This conclusion is supported by Pelletier's hesitation upon first seeing defendant's photograph. Cf. *United States* v. *Butler*, 405 F.2d 385, 396 (4th Cir. 1965).

It is unnecessary, in the Commonwealth's view, to inquire whether photographs viewed by witnesses in an effort to obtain a lead to a criminal's identity are discoverable as an abstract matter. See *Simmons* v. *United States*, 390 U.S. 377, 386-389; *Ahlsted* v. *United States*, 325 F.2d 257, 260 (8th Cir. 1963); *United States* v. *Peacock*, 400 F.2d 992, 1000 (6th Cir. 1968). Cf. *United States* v. *Barber*, 296 F.Supp. 795, 801, same case, 297 F.Supp. 917, 922. Certainly *Simmons* sets forth no rigid requirement of labeling and preservation as a matter of productibility under the Jencks Act or the Supreme Court's supervisory authority over federal criminal prosecutions, let alone as a constitutional right applicable to state prosecutions.

Here it is difficult to perceive any prejudice from their unavailability. Here, as in *Simmons*, "the strength of the eyewitness identifications of . . . [the defendant] renders it highly unlikely that nonproduction of the photographs caused him any prejudice" (390 U.S. at 389). Conversely, the inability of Sage to remember any characteristics of the other photos he was shown reinforces the conclusion that the convincing effect of the witnesses' in-court identifications was the product of their opportunity to view the defendant robbing the bank, not of their photo-identifications of him. *Commonwealth* v. *Blackburn*, Mass. Adv. Sh. (1968) 629 (354 Mass. 200, 203). Their identification was similarly independent of the photographs they did *not* select.

If other photographs were useful in shaking the eyewitnesses' identifications, there is nothing peculiar about

the photographs in the police files that made them any more useful in this respect than any other collection of photographs. If the point was to impeach the witnesses by showing that other persons resembled defendant and might easily be confused with him or his picture, any picture of defendant and another person resembling him would do. If police photographs were useful, counsel was invited to police headquarters to inspect all the photographs in the police files (Pre-trial Tr. pp. 16-18). Had he discovered there a photograph that might be useful for impeachment, there is nothing to indicate he could not have obtained a copy of it.

There is no indication that defendant's right to cross-examine the eyewitness or that the fairness of the trial was in any way impaired by the failure of the police to keep a record of all the other photographs the witnesses perused. There was no inconsistency between the photo and in-court identifications. (Compare *Commonwealth* v. *Carita*, Mass. Adv. Sh. (1969) 923, relied upon by defendant), and no indication whatever that the other photos were in any way exculpatory or that a particularized need existed for their production.

The defendant argues that the failure of the police to keep a record of the other photographs was equivalent to the "withholding" of evidence. Were that so, the police would be obliged to keep and produce a record of every false lead looked into during the course of a general investigation. The other photographs here were not evidence pertaining to guilt or punishment, nor evidence suppressed, nor evidence at all. They were not "proofs that may be favorable to him." Massachusetts Constitution, Declaration of Rights, Art. 12.

III. The Trial Court's Findings That The In-Court Identification Is Free Of Any Taint Is Amply Supported By The Trial Transcript.

The Trial Judge made the following finding:

> "I have never heard of more satisfactory identification in my life, and I have seen identifications and identifications of eyewitnesses, and I have a particular bug on — I mean, I think eyewitness identification normally is the poorest type to tie a guy into a crime. (Trial Transcript Vol. I, 50-51).
>
> And yet all of its essential details is right on the money, and yet he takes two books of mug shots and picks this fellow out. He is picking, he isn't going eeny-meeny-miny-moe. He sees this photograph — and it's not the best photograph of the way this man is today or was on the day of the holdup, because he has a Fu Manchu mustache, hasn't he?" (Trial Transcript Vol. 1, Tr. 52.)
>
> "The strength of the eyewitness identifications render it highly unlikely that nonproduction of the photographs caused him any prejudice." *Simmons* v. *United States*, 390 U.S. 377, 389.

In light of the trial judge's finding error, if any is harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250; *Chapman* v. *California*, 386 U.S. 18.

Conclusion

For the reasons stated in its brief, the Commonwealth respectfully requests that this petition be denied.

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APPENDIX A

COMMONWEALTH
v.
HERBERT E. GIBSON.

Supreme Judicial Court of Massachusetts, Suffolk.
Argued Jan. 6, 1970.
Decided Feb. 11, 1970.

Before WILKINS, C. J., and KIRK, SPIEGEL and REARDON, JJ.

REARDON, Justice.

The defendant appeals from a conviction on an indictment charging armed robbery of the Joseph Warren Cooperative Bank in Roxbury on July 22, 1968. The trial was held subject to the provisions of G.L. c. 278, §§33-A-33G. Of various errors assigned by the defendant, he presses four before us. We shall deal with these seriatim, making appropriate reference to the record and transcript of evidence as may be necessary.

[1] 1. The defendant first complains that after a pretrial hearing of his motion for discovery he was denied permission to examine photographs in possession of the police of persons other than the defendant examined by identifying witnesses. One of these, Albert Pelletier, treasurer of the bank and working as a teller when the robbery took place, who observed the robber about three minutes, called the police after the robbery had been completed. They arrived and he described the holdup man. He then went to Boston police headquarters and, having viewed over a hundred photographs, selected after some hesitation a picture of the defendant. Richard Sago, another bank employee and a university student, had a view of the robber for two and a half to three minutes. He also gave the police a description and, on the day of the robbery, the police returned to the bank with twenty-five or more

pictures which he went over. He too, identified a picture of the defendant as the robber. It is the defendant's contention that the refusal of permission to examine the photographs prevented "counsel for the defendant from effectively testing these critical identifications," and that under *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149, and *Simmons* v. *United States*, 390 U.S. 377, 383, 88 S.Ct. 967, 19 L.Ed.2d 1247, the photographs reviewed by Pelletier and Sage should have been made accessible to him likewise. Both witnesses, before they viewed the pictures, gave the police descriptions of the robber which were quite similar, they had both seen him on an occasion when the bank had been held up a month or so before, and they identified him positively at the time of trial.

While the photograph of the defendant was not a particularly recent one there was no indication of improper suggestion to the witnesses by police. Both witnesses were evidently reliable and intelligent. We agree with the Commonwealth that to require segregation of all photographs shown to witnesses in the investigatory stage of all crimes would be to place a heavy if not intolerable burden upon investigatory processes at a time when these processes are already overtaxed, and we are not disposed to do it. In any event, the jury had before them the complete story of the photographic identifications for such weight as they chose to give it. *Commonwealth* v. *Nassar*, 354 Mass. 249, 262, 237 N.E.2d 39. See *Commonwealth* v. *Wilson*, Mass.,[1] 245 N.E. 2d 439.

[2, 3] 2. The defendant is not content with the denial at a pre-trial hearing of his motion that the court instruct Sage and Pelletier concerning the right of defence counsel to interview them and also that the Commonwealth has no right to instruct them not to be interviewed. It appeared that the witnesses, in court at the time of a previous pre-

[1] Mass. Adv. Sh. (1969) 381.

trial hearing, were there solicited for information by defence counsel, at which time the district attorney told them they did not have to talk with him unless they so wished. We see nothing wrong here. The witnesses were not in protective custody (see *Commonwealth* v. *Carita*, Mass.,[2] 249, N.E.2d 5. They were available for interview at other times and places subject to their willingness to be interviewed. *Commonwealth* v. *McLaughlin*, 352 Mass. 218, 224, 224 N.E.2d 444.

[4] 3. At a pre-trial hearing held about a month before the trial, defence counsel was denied the right to argue a motion to suppress on the ground that the motion had not been "filed within ten days after a plea of not guilty, or within such further time in advance of trial as the Court * * * [might] order, unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion." Rule 101B of the Superior Court (1954). The court before trial did not permit counsel for the defendant to state the reasons for the late filing of his motion to suppress. In accord with the flexible application of the rule provided for in the exceptional circumstances to which the rule alludes, the defendant should have been allowed his offer of proof. In this instance, however, no harm was done for the evidence to which the motion to suppress was directed was concerned with certain "decoy" money stolen in the robbery and recovered by the police and all such evidence was struck, the jury being admonished to disregard it.

[5] 4. Finally, the defendant assigned as error the refusal of the trial judge to grant a mistrial. The occasion for the request arose during cross-examination of a police officer who was testifying concerning the photograph of the defendant in possession of the police which had noted upon it the date "1-22-58." Upon inquiry as to the meaning

[2] Mass. Adv. Sh. (1969) 923, 931-932.

of this notation over objection of the prosecution, the officer replied, "To my knowledge this was the last time he was arrested, photographed and fingerprinted." The court immediately ordered the testimony to be struck and ordered the jury to disregard it. There followed the motion for a mistrial and its denial. There was no further reference to this evidence nor was it in any way alluded to in the charge. We are confronted again with the question of whether to reverse in these circumstances. While it is clear that police witnesses, particularly those with years of experience such as this officer, should be at great pains to avoid such testimony, we feel that in this case the quick corrective step taken by the court was effective. It is a matter of fairly common knowledge that the central photographic files maintained by police do not in general contain the likenesses of any save those who have had some contact with criminal law. This fact would be appreciated by the average juryman. Sufficient harm did not spring from this testimony to give rise to reversible error, particularly in view of the quick corrective action of the court. *Commonwealth* v. *Gordon*, Mass.,[3] 254 N.E.2d 901.

Judgment affirmed.